UNITED STATES OF AMERICA
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

ANTHONY CARR,
Petitioner,
vs.

NATIONAL DISCOUNT CORPORATION,
an Indiana corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AMENDED SUMMARY OF EVIDENCE

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

Because the petitioner's summary of evidence as contained in the Petition for Certiorari is incomplete, inaccurate and misleading, we file this amended summary of evidence of the case.

As stated in the petitioner's summary of evidence, the petitioner was a used car dealer in Hamtramck, Michigan, and borrowed money from the respondent under what is known as "floor plan mortgages". Although petitioner had the physical possession of the automobiles, the mortgages provide:

> "That the mortgagor will not encumber nor part with possession of said property nor will remove the same nor suffer the same to be removed from the premises of the mortgagor above set forth; that the mortgagor will not drive the said automobiles or per-

mit any person to drive same, nor will use the same in any way except for the purpose of display on show room floor;" (82).

As additional security in order to prevent the sale of the automobiles without discharge of the mortgage, and to protect the purchasers, the respondent kept the titles to the automobiles in its possession until the mortgages were paid.

As stated by petitioner, he sold two automobiles, one to Chester Oberzanek, and the second to Al Gardis, receiving the full sales price in cash, delivered possession of the automobiles to the purchasers but did not pay nor make any attempt to pay the mortgages against the said automobiles, and did not deliver the titles to the automobiles to the purchasers. Under the law of Michigan, a used car dealer may not sell an automobile without delivery of title to the automobile at the time of taking possession by the purchaser, under penalty of fine or imprisonment. Sec. 9.1474 and 9.1475 of Chapter 73 of *Mich. Stat. Annot.*, Act No. 272, *P. A.* 1945.

Approximately three weeks after the sale of the automobiles by the petitioner and during which time the purchasers had constantly endeavored to obtain their titles (55) the respondent, because of the breach of the mortgages, foreclosed and repossessed itself of the automobiles in the possession of the petitioner. Respondent, in addition to these automobiles, repossessed the automobile purchased by Oberzanek and attempted to obtain possession of the automobile purchased by Gardis. As a result of these actions, Gardis saw his attorney and went to the Prosecutor's office and was told there to make complaint to the Police Department at Hamtramck. He then went to the police department and saw Sgt. Repke and told his story to him. He was advised that the police were already looking for the petitioner and when he was arrested he would be informed (56).

On the 19th of October, he received a call from the Hamtramck Police that they had arrested Anthony Carr and to come to the police station. He went to the police station and there saw Chester Oberzanek. At that time Oberzanek filed a complaint with the Hamtramck Police (56, 87-89).

The first time the respondent's agent came in contact with the police department was on October 19th, after the petitioner had been arrested by the Hamtramck Police (13).

The petitioner was released by the Hamtramck Police on October 21st. There is some conflict in the testimony as to whether he was to appear in the Prosecutor's office on October 21st. Petitioner denies that he was told that he was to so appear, but witness Gardis testified that he was to appear and when Gardis appeared at the Prosecutor's office the matter was put over until the following day (57) and the petitioner was again arrested on October 21st. It does not appear that this was a result of any complaint by either the respondent or the purchasers of the automobiles.

When the parties appeared in the Prosecutor's office on October 22, there were present the Hamtramck Police, petitioner, Gardis and Oberzanek, the purchasers, and representatives of the respondent. A conference was held with an assistant prosecutor and the money which had been raised by petitioner's wife for payment of the mortgages and given to the Hamtramck Police by her, was then turned over to the respondent's agents, titles were delivered to the purchasers and the complainant Chester Oberzanek, then endorsed on the complaint the following: "I do not desire to prosecute. Restitution has been made. Chester Oberzanek" (88).

It is not true, as stated by petitioner, that upon leaving the Prosecutor's office the defendant's agent, Maurice Harte, told the petitioner that the respondent had caused his arrest. What was said, as testified to by the petitioner is as follows:

> "When we were leaving there he said 'any time we want to get any money from the dealer we know how to do it.' I said, 'what do you mean.' He said, 'all we have to do is repossess the car from the purchaser; then the purchaser goes back at the dealer, and then the purchaser, if he can't get any satisfaction from the dealer, he goes to the police department'" (32).

During the course of the trial in the District Court and at the argument before the Circuit Court of Appeals,

petitioner did not take the position that the respondent had directly procured the arrest of the petitioner but had indirectly done so by virtue of its repossession of the automobiles from Oberzanek and its threat to repossess from Gardis (66, 101-102).

Respondent in its pleadings denied in toto the allegations of the petitioner, denied that it had caused his arrest, either directly or indirectly; and says that he was arrested by the Hamtramck police for passing bad checks and that the Hamtramck police had sufficient justification for arresting him (5-8).

ARGUMENT

The petitioner complains that the Circuit Court of Appeals confused the issue by injecting the question of probable cause in the case; that probable cause is a defense only in malicious prosecution cases and is not involved in false imprisonment. Judge Simons in his opinion, however, was following the law as set forth by this Court through Mr. Chief Justice Taft in *Director General vs. Kastenbaum*, 263 U. S. 25, 68 L. Ed. 146, 147, where the Court said:

> "The action for false imprisonment is in the nature of a trespass for a wrong or illegal act in which *the defendant must have personally participated, directly or by indirect procurement.* The gist of it is an unlawful detention, and that being shown, the burden is on the defendant to establish probable cause for the arrest. *The want of probable cause*, certainly in the absence of proof of guilt or conviction of the plaintiff, *is measured by the state of the defendant's knowledge, not by his intent. It means the absence of probable cause known to the defendant when he instituted the suit. But the standard applied to the defendant's consciousness is external to it. The question is not whether he thought the facts to constitute probable cause, but whether the Court thinks they did.*" (Italics ours).

The question of probable cause in actions of false imprisonment has also been discussed and decided by the

Supreme Court of Michigan, and the Circuit Court of Appeals, in following the Kastenbaum case, supra, was also following the law of Michigan. In *Schneider vs. Shepherd,* 192 Mich. 82, plaintiff brought an action against defendant who was then prosecutor of Wayne County, for false imprisonment; and the Court in discussing the question of probable cause, said:

> "The learned trial judge submitted to the jury the question whether or not there was probable cause of making the arrest of the plaintiff and prosecuting the search of his house. It is urged by counsel for the appellant, that the facts herein question being without dispute, a question of law was presented for the court to decide, and that it should not have been submitted to the jury, and we are of the opinion that this contention of counsel is sound; for what facts and circumstances amount to probable cause is a pure question of law. A careful examination of the record discloses that all the essential facts involved here are undisputed, and under the well-settled rule of law the question of a want of probable cause thereupon became a question of law, to be determined by the court upon a consideration of the facts involved in the particular case."

See also *Larson vs. Collins,* 195 Mich. 492; *White vs. McQueen,* 96 Mich. 249.

In all of the cases cited by the petitioner, in which the Michigan Supreme Court uses the term justification, it will be found that the defendant had directly participated in the arrest in some form or manner and was based upon a warrant which had been issued. The question then became one for the defendant to justify the issuance of the warrant.

It is quite apparent that the law in Michigan, as well as that of the Federal Court, is that in cases of false imprisonment, where a case is made, the defendant may show probable cause for the complaint leading to the arrest and that if the Court finds as a matter of law that there was probable cause, then there can be no liability. In the instant case the verdict having been directed for the defendant, there is no dispute as to the facts and the Court was

then required to determine as a matter of law whether or not there was probable cause, and the Court did find that there was probable cause for a complaint on the part of Oberzanek and Gardis, as is set forth in Judge Simons' opinion (104, 105).

This case, however, is not a simple one in which the defendant is accused of direct participation or procurement of false arrest. Here the complaint is that the defendant indirectly procured the arrest of the plaintiff. Such indirect procurement was not the result of complaint to the police officers, but was the taking of a legal action by the respondent in repossessing itself of property upon which it had a mortgage and for a breach thereof. It is not complained that the purchasers, Oberzanek and Gardis, were told to go to the police department, but the complaint is that by reason of a legal action taken by the respondent the purchasers of their own accord went to the police department to make complaint.

We have been unable to find any cases in Michigan or elsewhere in which the facts are similar to the case at bar. However, it is significant that in several cases decided in the Supreme Court of Michigan under slightly different circumstances, the Court held that there was no liability.

In *White vs. McQueen,* 96 Mich. 249, an action was commenced against the defendant who was sheriff of Kent County, Michigan, for false imprisonment. Plaintiff had been arrested upon suspicion that he was guilty of a felony. Although the case was reversed on the ground that the Court found that defendant did not have sufficient knowledge upon which to act, the Court in discussing the liability of one for false arrest, says:

> "When an officer in arresting fugitives from justice, and those who he honestly believes have been guilty of a felony, has acted in good faith, and after such investigation as the circumstances permitted him to make, he will be protected in his action, and will be relieved from the consequences of a false imprisonment. This is required for the protection of society, and to prevent the escape of criminals."

A case more nearly in point is that of *Shinglemeyer vs. Wright,* 124 Mich. 230. In this case, the defendant was

sued for false imprisonment on the ground that he had made a complaint to a police officer that the plaintiff had stolen his bicycle. The plaintiff was then arrested by the police officer, taken to the police station and after investigation was released. The Court says, in discussing the testimony:

> "The officer does not testify that defendant said he wanted her arrested, and defendant expressly denies it. Whatever restraint the officer placed upon her, if any, is not shown to have been at the request of the defendant." * * *

The Court, in deciding the liability of the defendant for false imprisonment said:

> "Under the uncontradicted testimony, the defendant could not be held liable for false imprisonment. If plaintiff was illegally restrained of her liberty, the officer alone is responsible for it."

Similarly, in the case at bar, this respondent made no complaint to the police department against the plaintiff and such complaint as was made was by the purchasers of the automobiles, not at the request of the respondent, and if anyone is liable for false arrest it may be the purchasers who made the complaint or the police officers who arrested the petitioner.

As the trial judge, and the Circuit Court of Appeals found:

> "There is no evidence that appellee had filed a complaint with the Hamtramck Police Department (101). * * *
>
> We find no evidence that the appellee had lodged a criminal complaint against the appellant. It had not suggested to Oberzanek to make such complaint. If the observation made to Gardis, to-wit: 'You go after Tony' may be construed as instigating the arrest it failed to have that result because Gardis lodged no formal complaint with the police" (103).

In order to justify or to show probable cause it must first be shown that one has committed an act requiring

justification or the showing of probable cause. In this case, as we have heretofore pointed out, respondent was not directly involved in the arrest, it neither asked for the petitioner's arrest, directed it or participated in it, and so far as indirect procurement is concerned both the trial court and the Circuit Court of Appeals has found, as a matter of fact, that the respondent was not guilty of indirect procurement or instigation of the petitioner's arrest. In this connection we point out to the Court that the respondent in its answer filed in the trial court, denied that it had caused the plaintiff's arrest and specifically set forth that his arrest had been caused by the Hamtramck Police for passing bad checks and upon the complaint of Oberzanek, and that there was sufficient justification by the Hamtramck Police for his arrest (6-8).

CONCLUSION

We respectfully submit that the arrest of the plaintiff was caused by his own actions in passing bad checks and in disposing of mortgage property; that the complaint upon which he was arrested was made by Oberzanek and that this respondent had no connection, either directly or indirectly, with his arrest unless it can be said that the pursuit of a lawful remedy constitutes instigation which can lead to damages. This respondent had no control over the actions of either Oberzanek, Gardis or the Hamtramck Police, and to hold one liable for damages under such circumstances would be a gross miscarriage of justice.

We submit that the petition for certiorari should be dismissed.

Respectfully submitted,

JASON L. HONIGMAN,
LOUIS ROSENZWEIG,
Attorneys for Respondent.